

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

DOUGLAS WISE,)	
Appellant,)	
)	
and)	
)	CASE NO. 100005
STATE OF IOWA)	
(DEPARTMENT OF HUMAN SERVICES),)	
Appellee.)	
)	

DECISION ON REVIEW

This case is before the Public Employment Relations Board (PERB or Board) on Appellee State of Iowa's petition for review of a Proposed Decision and Order issued by an administrative law judge (ALJ) following an evidentiary hearing on Douglas Wise's Iowa Code section 8A.415 appeal. In his Proposed Decision and Order issued October 14, 2016, the ALJ concluded that that the State of Iowa had not established just cause for its termination of Wise's employment with the Department of Human Services on October 31, 2014. The ALJ ordered Wise's reinstatement to his former position at Glenwood Resource Center or, if the position did not exist, to a substantially equivalent position with back pay, a restoration of benefits and other appropriate adjustments.

Counsel for the parties, Jeffrey Edgar for the State and Charles Gribble for Wise, presented their oral arguments to the Board on December 16, 2016. Prior to oral arguments, the parties filed briefs outlining their respective positions.

Pursuant to Iowa Code section 17A.15(3), on review of the proposed decision, the Board possesses all powers that it would have possessed had it elected to preside at the evidentiary hearing in the place of the ALJ.

The Board has fully considered all of the State's arguments on review. None have persuaded us to reach conclusions different than those reached by the ALJ. Based upon its review of the record before the ALJ, as well as the parties' briefs and oral arguments, the Board agrees with the ALJ's Proposed Decision and Order and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in the Proposed Decision and Order attached as "Appendix A," are fully supported by the record. The Board adopts the ALJ's factual findings as its own and they are, by this reference incorporated herein and made a part hereof as though fully set forth.

CONCLUSIONS OF LAW

The ALJ's conclusions of law, as set out in Appendix A, are correct, and the Board adopts them as its own. They are, by this reference, incorporated herein and made a part of this decision as though fully set forth.

Accordingly, we enter the following:

ORDER

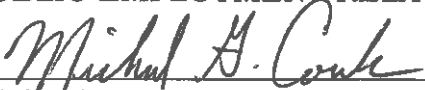
The Department of Human Service shall reinstate Douglas Wise to his former position as Treatment Program Administrator of Glenwood Resource Center's Residential Area 3 (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore his benefit accounts to reflect accumulations he would have received but for his discharge; make appropriate adjustments to his personnel

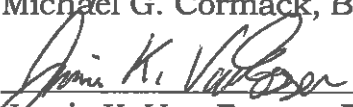
records and take all other actions necessary to restore him to the position he would have been in had he not been terminated on October 31, 2014.

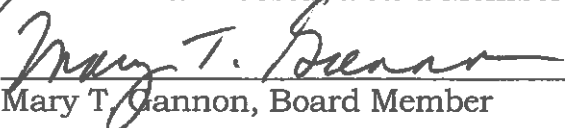
This decision constitutes final agency action only on the issue of whether the State established just cause for Wise's termination. The Board retains jurisdiction of this matter in order to address any remedy-related matters which might hereafter arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, in the event the parties fail to reach agreement, the Board will schedule a hearing to be conducted within 45 days of the below date to receive evidence and arguments on the precise terms of the remedy. Agency action on the appropriate remedy will not be final until its specifics are approved or determined by the Board. The Board retains jurisdiction to enter whatever orders may be necessary or appropriate to address any remedy-related matters which may hereafter arise.

DATED at Des Moines, Iowa, this 19th day of December, 2016.

PUBLIC EMPLOYMENT RELATIONS BOARD

By: 
Michael G. Cormack, Board Chair


Jamie K. Van Fossen, Board Member


Mary T. Cannon, Board Member

Electronically filed.
Parties served via eFlex.

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

DOUGLAS WISE,
Appellant,

and

STATE OF IOWA (DEPARTMENT
OF HUMAN SERVICES),
Appellee.

CASE NO. 100005

PROPOSED DECISION AND ORDER

Appellant Douglas Wise filed this State employee disciplinary action appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 8A.415(2)(b) and PERB subrule 621—11.2(3), alleging that the termination of his employment with the Iowa Department of Human Services (DHS) was without just cause.

Pursuant to notice, a public evidentiary hearing on the merits of the appeal was held before me on October 28, 2015, at PERB's offices in Des Moines, Iowa. Wise was represented by attorney Charles E. Gribble and the State by attorney Jeffrey R. Edgar. Both parties submitted post-hearing briefs, the last of which was filed December 4, 2015.

Based upon the entirety of the evidentiary record, and having reviewed and considered the parties' briefs, I conclude that under the totality of the circumstances just cause for Wise's discipline has not been established.

FINDINGS OF FACT

In 1980, after earning a BS degree in education with a minor in psychology and science, Wise worked as a psychology assistant at a State

of Nebraska institution for seven years before beginning employment as a treatment program manager at the State of Iowa's Glenwood Resource Center (GRC) in 1987.

Managed by the Iowa Department of Human Services (DHS), the GRC is an intermediate care facility providing care, support and active treatment for individuals with a wide range of intellectual disabilities. The GRC serves approximately 237 individuals from 12 to 90 years of age who reside at the facility, as well as 19 others who live in the Glenwood community. Most of the individuals served have severe mental illnesses.

GRC's superintendent, Gary Anders, is in charge of the facility and reports to an outside DHS deputy director. Anders began his employment with the State in 2003 as a physical therapist and became the assistant superintendent of treatment therapy services at GRC in 2004. In 2013 he was assigned as GRC's interim superintendent and became superintendent in May, 2014.

Approximately 800 people are employed in GRC's three organizational components—support services (environmental services, food services, and administrative support), clinical or therapeutic services (primarily clinical, medical, nursing, physical therapy, occupational therapy, speech therapy and pharmacy services) and program services (providing around-the-clock services for the residents at GRC).

The GRC's residents occupy 19 homes, which are divided into three "treatment areas" for organizational purposes. One treatment area consists of

five homes while the other two each have seven homes. Grouped by age and functioning level, nine to 15 individuals live in each large ranch-style house. Many GRC residents are able to leave the facility to engage in off-campus activities, including shopping for personal items, for 12 to 16 hours each day.

A separate treatment program administrator (hereafter “administrator”) oversees each of the three residential treatment areas. Although the administrators have at times reported to an assistant superintendent for treatment program services, at the time of the events involved in this case this assistant superintendent position was vacant, and the administrators reported directly to Superintendent Anders. Administrators have the ultimate responsibility to ensure that services and support are provided to the residents in the treatment area to which he or she is assigned. Each administrator supervises and evaluates the treatment program managers (hereafter “managers”) within his or her treatment area.

Each manager oversees one home (or, in at least one case, two homes). The managers maintain offices in the institution’s administration area, and each is responsible for ensuring that the residents in their assigned home(s) receive the support required. Each manager reports to the administrator overseeing his or her residential treatment area and directly supervises a resident treatment supervisor (hereafter “supervisor”) assigned to the home, as well as indirectly supervising the resident treatment workers (RTWs) who provide day-to-day support and services in each home. The supervisor for

each home maintains an office in the home itself, reports to the home's manager, and directly supervises the RTWs assigned to the home.

The manager, together with the administrator to whom he or she reports, facilitates an interdisciplinary team (IDT) which includes staff from clinical services. The IDT establishes support plans for each resident, modifying them as warranted. The manager also supervises a psychology assistant, monitors the progress of the residents, develops supports for each resident with the assistance of the IDT and completes an annual assessment for each resident.

Wise worked as a manager for approximately 13 years until he was promoted to the position of administrator for Area 3—one of GRC's seven-home treatment areas. He worked as an administrator for the next 14 years until his employment was terminated on October 31, 2014.

In late 2008 Wise executed an updated Position Description Questionnaire describing the work he was expected to perform in his capacity as a GRC administrator, and in January, 2011, signed an acknowledgement that he had received the State of Iowa Employee Handbook and various state policies and was expected to read and be familiar with the materials.

Approximately 100 individuals resided in the seven homes in Wise's treatment area. He directly supervised six managers overseeing the homes (one manager was responsible for two homes) as well as an "office supervisor" who was in charge of staffing for the treatment area, and indirectly supervised the other treatment area staff (seven supervisors, seven

psychology assistants, and approximately 145 resident treatment workers). Wise conducted weekly program meetings with the managers and supervisors of the homes in his treatment area. During the meetings, he trained staff on policies or procedures and made a round-table discussion/open forum a part of every meeting, allowing staff an opportunity to provide updates or ask questions. He provided direction and support when needed.

Wise was respected by those beneath him as a supportive administrator with an open-door policy who was not a micro-manager and who, while expecting people to do their jobs, was readily available to provide ideas, direction and support. He was viewed as an administrator who hired and promoted people because he trusted and had faith in them and their abilities, and who empowered people to do their jobs while challenging them to help come up with solutions to concerns.

The key events leading to Wise's termination involved "House 248," one of the seven residences in his treatment area, where 10 to 12 young men from high school age to age 28 resided. The home's residents had relatively mild intellectual disabilities, but most had some severe mental illness. The residents of House 248 were relatively active, independent and intelligent young men who possessed and utilized personal items for their entertainment, some of which were battery-powered. Wise characterized them as "pretty promiscuous, I would say, and they would—they would do anything to help one another. . . ."

The manager of House 248, with primary responsibility for it, was Rob Wallace and its supervisor was Karen Stafford. Wise thought highly of Wallace and had promoted him from a support position to manager. Wise had supervised Wallace for seven or eight years and had always evaluated his job performance as meeting or exceeding expectations. To Wise's knowledge, Wallace had always carried out the directives given to him. Wise had confidence in him and never had reason to question his honesty or reliability. Wise's regard for Wallace extended to his having named Wallace as Wise's "administrative designee" to perform his administrative tasks on days when Wise was not present at GRC. As the manager of House 248, Wallace supervised the supervisor, Stafford, the psychology assistant and (indirectly) the RTWs who provided the daily support and services for the residents.

On June 2, 2014, a resident of House 248 (DH) swallowed four batteries (the precise nature and size of which is not revealed by the record) which required surgical removal. This was not an unprecedented occurrence. Over the years, other GRC residents had swallowed inedible items including screws, nails and sticks—a professionally recognized behavior known as pica. Accordingly, a process to follow in response to pica behavior is set out in the GRC incident management policy—a nurse is contacted immediately, necessary medical care is provided, and a report is made to the superintendent, administrator and the IDT. The IDT is to then develop a plan to curtail the behavior.

DH's ingestion of batteries was reported to Iowa Department of Inspections and Appeals (DIA) and was fully investigated at the facility.¹ The IDT increased DH's supervision in an attempt to prevent further ingestions.

On July 25, 2014, DH ingested batteries again and, although the record does not reveal its source, the decision was made to remove batteries from some, but not all areas of House 248.

The notes of the IDT's July 28, 2014 meeting reveal that the remote controls for the State-owned televisions in the home had been removed and that the IDT had determined that all batteries would be removed from the home. House 248 staff began to remove, inventory and securely store the batteries, but the IDT was subsequently told by GRC's quality assurance director that Superintendent Anders had rejected the idea of total removal of all batteries, and directed that those which had been removed should be returned. Wallace spoke with Wise and indicated that he was uncomfortable with the directive to return the batteries, viewing it as undermining what the IDT was attempting to do.

On August 19, 2014, a second resident (JM) ingested a battery in what was viewed as an attention-seeking "copy-cat" incident. The following day Anders gave a verbal directive to Wise to have all batteries removed from House 248. Wise contacted Wallace and informed him that all batteries from House 248 needed to be removed immediately, and learned Wallace had also received the directive from Anders. Wise directed Wallace to have Stafford

¹ Following its investigation, DIA cited GRC as a result of the June 2, 2014 incident and imposed a \$2,000 fine, which was subsequently reduced to \$1,300.

assist in removing the batteries and asked if Wallace needed his help, but Wallace declined the offer of assistance.

Wallace and Stafford, working separately, conducted a room-by-room sweep of House 248 to locate and remove batteries, each going through different rooms. They informed house staff that there were to be no batteries in the home and that if any were found they were to be locked in Stafford's office. Stafford labeled the batteries she and Wallace had located and locked them in her office. Both Wallace and Stafford reported back to Anders that all batteries had been removed and Wallace reported the same information to Wise.

Having been told that Wallace and Stafford had searched room to room and removed all the batteries, Wise did not question either Wallace or Stafford concerning precisely how or where the search had been conducted, assuming they had gone through everything with a fine-toothed comb. Nor did he direct that periodic searches continue because Wallace had advised him that house staff had been informed of the directive to remove all batteries and that staff would make environmental sweeps through the house each shift.² Wise took Wallace's word that that was being done.

² Neither Wallace nor Stafford testified at the hearing. During their interviews with DHS investigators, summarized in part below, Stafford indicated unequivocally that ongoing sweeps for batteries had not been set up because "we weren't told to." Wallace's statements to the investigators concerning whether ongoing monitoring was conducted were less absolute and somewhat inconsistent. But regardless of whether additional sweeps or enhanced monitoring in fact took place, I have credited Wise's testimony at hearing that Wallace had told him that environmental sweeps through the house would be conducted each shift.

Anders also assumed the accuracy of the reports from Wallace and Stafford. Although Anders had not personally swept the house or questioned Wallace or Stafford concerning the specifics of their search, on August 22 he emailed his supervisor at DHS, assuring him that all batteries had been removed from House 248.

On August 27, 2014, DIA investigated the second ingestion of batteries by DH and the ingestion by JM and on September 3 ended its investigation, verbally reporting that GRC would receive a deficiency and possibly a citation and fine.

Although any perceived deficiencies in Wise's behavior or job performance had not been called to his attention or discussed with him by any member of GRC management, on August 28, 2014 an investigation of Wise's "alleged violation of the department work rules and state policies" began. The investigation included at least two separate interviews of Wise, which included at least some discussion of the battery issues at House 248 and how Wise had responded to them.

On September 5, a GRC social worker notified Wise, through email with copies to Stafford, Wallace, and others, that parents had revoked their authorization for the battery ban's application to their son (not DH or JM) who was a resident of House 248. Wise forwarded the email to Anders, asking his thoughts on the matter. Anders responded that he would get direction for Wise.

Sometime after September 8 Anders and Wise met with House 248 staff, the discussion including the seriousness of the battery situation and the need for supervision and accountability.

On September 10 Wallace emailed a proposed plan to reintroduce batteries back into House 248 to Wise, Stafford, and others. Later that day, following a conversation between Wallace and Anders during which Anders again indicated no batteries were to be in the house, Wallace also forwarded the proposed plan to him.

Wallace did not tell Wise of his September 10 conversation with Anders. Wise, having received no further response to his September 5 email, wrote another email to Anders on September 12, asking if he had received direction. Anders responded that "[t]he batteries are to continue to be removed from the environment. Considered dangerous to at least one individual in the environment. Rob [Wallace] has recommended a plan for the return of batteries. I will be reviewing the plan and making recommendations for modification to the plan as needed. When it is determined that batteries can be returned to the environment, the approved plan can be implemented."

Wise was frustrated that Anders had not responded to his September 5 email and had instead relayed the direction to continue the exclusion of batteries to Wallace only. Wise responded to Anders that the content of Anders' email was "[g]ood to know" and Anders replied that he had told Wallace that batteries should continue to be excluded during the prior week and had assumed that Wallace had informed Wise.

Later on the morning of September 12, Wallace emailed Anders and Wise, advising that JM had been receiving enhanced staff supervision and inquiring whether reducing his supervision level to “a 15 minute accountability” while awake—still a level above general supervision—would be permissible. Although he had not personally swept the home for batteries since participating in the August 20 search, but had reportedly directed house staff to make environmental sweeps and remove any batteries they discovered, Wallace’s email also advised Anders and Wise that “[t]he batteries are out of the home.”

Anders responded that JM’s supervision level and the exclusion of batteries from the home should continue unchanged until GRC received and reviewed the results of DIA’s investigation, at which time a reduction of JM’s supervision and a return of batteries could be considered.

Between September 8 and early October, Wise made two or three visits to House 248. While he did not enter any resident’s personal bedroom in search of batteries, he scanned the environment visually to see if remote controls or other small items possibly containing batteries were accessible, and saw none. From the completion of the August 20 room-to-room search until October 7, 2014, no one ever informed Wise that there was a continuing problem with batteries in House 248, leading him to believe that the battery situation there was under control.

On September 17, House 248 Supervisor Stafford began a medical leave of absence which continued until October 20, 2014.

Since his initial employment at GRC in 1987, Wise had never received a performance evaluation which concluded that his work did not at least meet expectations. And although they were prepared by a number of different immediate supervisors, of the seven evaluations admitted into evidence, covering the period from November, 2003 through October 20, 2012, three rated Wise's overall performance as exceeding expectations, four indicated he met expectations and none rated his performance on any of the specific goals set out in his performance plans as failing to meet expectations.³ In 2003 he had received the Governor's Golden Dome Award in the "Leader of the Year" category. During his entire tenure at GRC, Wise had never been the subject of any disciplinary action.

Anders did not share Wise's prior supervisors' view of his work performance. On October 3, 2014, he issued a special performance evaluation of Wise's work for the period November 12, 2013 through October 3, 2014.⁴ Anders evaluated Wise using the same four individual performance goals which had formed the basis for Wise's most recent performance plan and annual evaluation. In that prior evaluation, for the period of October 20, 2011 through October 20, 2012, Wise's supervisor had rated him as exceeding expectations on three of his performance goals and as meeting expectations on the other.

³ No annual evaluation of Wise's performance for the period from October, 2012 through October, 2013 was conducted, his supervisor having left the position in November 2013 without having prepared the evaluation.

⁴ This period coincides with the date Anders began supervising Wise through the date of the special evaluation itself.

Anders, however, rated Wise as not meeting expectations on all four goals. Anders' accompanying comments included his views that Wise fails to anticipate problems or gather and analyze information to prevent problems, fails to facilitate teamwork within his area, does not consistently complete projects within time frames without prompting and does not seek direction from others to assist with completion of work assignments. In conjunction with the unfavorable performance evaluation, Anders presented Wise with an extensive work directive specifying nine requirements of his position, most including multiple specific actions Wise was to perform to fulfill those requirements, including the need for his increased monitoring of homes and staff supervision. The work directive concluded with the notation that "[f]ailure to follow these directives will result in discipline, up to and including discharge. You will meet with your supervisor on a regular basis, minimum of monthly, to review and ensure compliance with the directives."

In addition to the performance evaluation and work directives, on October 3 Anders also presented Wise with a letter notifying him of the completion of the investigation commenced on August 28 and of Anders' imposition of "alternative discipline in lieu of a suspension without pay" in the form of what the parties refer to as a five-day "paper suspension." The letter indicated that the investigation, completed on September 30, had led Anders to conclude that Wise had violated five DHS work rules⁵ by allegedly

⁵ The rules which Anders concluded had been violated were rule 1 (employees shall cooperate and follow the instructions of supervisors or other designated members of management); rule 2 (employees shall perform their work properly and efficiently and meet performance standards); rule 5 (employees shall maintain appropriate control of themselves,

failing to monitor compliance with regulations, failing to provide direction to staff with respect to the correction of performance deficiencies, failing to conduct regular rounds, failing to be forthcoming and truthful when answering questions, losing his temper and making demeaning statements to staff, and showing preference to some staff while targeting others.⁶ Anders was aware of Wise's long tenure at GRC and of the fact that Wise had never been the subject of disciplinary action, but determined that the five-day "paper suspension," which Anders characterized as the penultimate pre-termination sanction in GRC's disciplinary progression, was appropriate. While this alternative discipline required that he report to work as usual and covered October 3, 6, 7, 8 and 9, since October 4 and 5 were a Saturday and Sunday when Wise was not scheduled to work.

During the evening of October 7 the second-shift administrator on duty, Dan Hunter, found 42 batteries in House 248 and notified Anders that evening. The next morning, October 8, Wallace informed Wise that Hunter had found batteries in House 248, but did not indicate how many had been discovered. Wise was astonished at the news and told Wallace to make sure batteries were removed from the house and to try to find out where those which had been discovered had come from.

even under provocation); rule 19 (employees shall cooperate and provide assistance with any type of investigation) and rule 26 (employees shall not discriminate or retaliate against, or show favoritism toward any person).

⁶ Wise filed a grievance challenging the suspension pursuant to the uniform grievance procedure established by DAS rules and appealed the DAS denial of the grievance to PERB, where the appeal was dismissed on the State's motion due to the untimely filing of the underlying grievance.

Later that day, Anders called Wise to a meeting and suspended him with pay, effective immediately, pending the outcome of an investigation of the batteries found in House 248. Wise was directed to turn in his cell phone and office keys, and to leave the facility. The letter of suspension included specific instructions that Wise was to be available by telephone and able to report to GRC within one hour of notification to do so. Wallace was also suspended with pay pending completion of the investigation.

From October 8 through October 13, 113 additional batteries, as well as four battery packs and two items (one a stuffed animal toy) containing unknown types and quantities of batteries were found in House 248.

Between October 8 and October 21, 2014, an investigation of the matter was conducted by another GRC administrator, Kelly Robinson, and GRC's assistant superintendent, Kelly Brodie. Their investigation included interviews with Wise, Wallace and Stafford, transcriptions of which were admitted into the evidentiary record.

Noteworthy aspects of Wallace's interview include his characterization of the directives he received from Anders and Wise that all batteries be removed from House 248. Although both Anders and Wise view their directives to Wallace as clear and unambiguous, Wallace stated that he understood the directives as meaning only that he and Stafford "were to make reasonable efforts to take out the batteries that were in the home." And although Wallace had twice previously reported unequivocally that batteries were out of the home, during his investigatory interview he indicated that he

and Stafford had “removed the batteries that we knew of,” but acknowledged that he never thought of looking in a stuffed toy, indicating that he looked for items which would obviously contain batteries.

Wallace told the investigators that he had not set up ongoing sweeps of the house to see that batteries were not brought in, but later indicated, seemingly inconsistently, that he had told staff that “we have to make sure that there are no batteries in this home” and that staff needed to keep looking for batteries.

During her investigatory interview, Stafford characterized the directive to remove batteries from House 248, relayed to her by Wallace, as one to “get all the batteries you can find.” Stafford related that others, including Hunter, had gone through the house and reported that they had taken all the batteries, but that “just to be on the safe side” she and Wallace had also looked and had found numerous batteries in dresser drawers and night stands, but acknowledged that she had not searched everything in the rooms she had swept, mentioning trunks “I didn’t even think of . . . because most of the stuff are things they don’t mess with and stuff like what they want to take home.”

The investigation concluded on October 21, 2014. On November 6, Anders presented Wallace with a written notice of Anders’ imposition of alternative discipline equivalent to a one-day (paper) suspension, due to Wallace’s failure to carry out Anders’ August 20 and September 12 directives to remove all batteries from House 248; his (perhaps inaccurate) September

12 representation that “[t]he batteries are out of the home;” the fact that batteries had subsequently been found in the home, and his admission that he and Stafford did one sweep of the home on August 20, but had not done additional sweeps or consistently monitored the environment to ensure all batteries were gone or that batteries were not reintroduced. Anders’ letter concluded that Wallace had violated DHS work rules 1 and 2, upon which the discipline was based. Wallace also received a work directive, which included notice that Wallace was immediately reassigned to the position of manager for House 472.

On November 19, upon her return from medical leave, Stafford was issued a written reprimand due to her having received the August 20 directive that all batteries were to be removed from House 248, batteries having subsequently been found in the home, and the investigation’s finding that she had not done additional sweeps after August 20 or consistently monitored the environment to ensure all batteries were gone and were not reintroduced. As was the case with Wallace, Anders’ letter concluded that Stafford had violated DHS work rules 1 and 2, upon which the discipline was based.

As a result of the investigation, Anders concluded that Wise had also violated the same DHS work rules breached by Wallace and Stafford and determined that Wise’s employment should be terminated. On October 31, 2014, Wise was summoned to GRC where Anders presented him with a letter of termination which recited that Wise had been given a verbal directive on August 20 for batteries to be removed from House 248 and a written directive

on September 12 that the exclusion of batteries was to continue; that 155 batteries had been found in the home between October 7 and October 13; that Wise had taken no personal action to ensure the removal of all batteries; that Wise had taken no action to confirm Wallace's claim that all batteries had been removed, had not established a system for monitoring the environment and had not completed "monitors" to ensure the batteries were removed or were not reintroduced; that Wise had only visited the home two to three times between August 20 and October 7; that Wise had not established regular rounds to ensure compliance with the directive, and that Wise had not required staff to complete ongoing sweeps or required supervisors to provide enhanced supervision to ensure the absence of batteries. Based upon these findings, Anders concluded that Wise, like Wallace and Stafford, had violated DHS work rules 1 and 2, which the termination letter quoted as providing:

Section D-1 General Standards of Conduct and Work Rules

The following general standards of conduct and work rules are intended to illustrate minimum expectations for acceptable work performance and workplace behavior. They are not all-inclusive. Misconduct not specifically described will be handled as warranted by the circumstances of the case involved. Violation of a work rule may result in discipline up to and including discharge, and in some cases may result in legal action.

1. An employee's job is important, and employees are expected to cooperate and follow the instructions of supervisors or other designated members of management. Insubordination (intentional refusal to follow an authorized supervisor's reasonable orders

or instructions) is prohibited unless such instructions are contrary to the Code of Iowa.

2. Poor work is not acceptable. Employees are expected to perform their work properly and efficiently and to meet performance standards. Employees are expected to seek, accept and accurately complete assignments within deadlines and not neglect job duties and responsibilities.

Under the supervision of GRC's assistant superintendent, Wise cleared his office of personal belongings and left GRC's campus. He filed a noncontract grievance with the Department of Administrative Services (DAS) on November 3, 2014, challenging the existence of just cause for his termination and seeking immediate reinstatement to his position. The DAS director's designee denied the grievance on December 4 and Wise subsequently filed the instant disciplinary action appeal with PERB.

CONCLUSIONS OF LAW

Wise filed his appeal pursuant to Iowa Code section 8A.415(2), which provides:

2. Discipline resolution.

a. A merit system employee who is discharged, suspended, demoted or otherwise receives a reduction in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the [DAS] director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.

b. If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The employee has the right to a hearing closed to the public, unless a public hearing is requested by the employee. The hearing shall otherwise be

conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act, chapter 17A. If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

DAS rule sets forth specific disciplinary measures and procedures for disciplining employees:

11-60.2(8A) Disciplinary actions. Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge. . . . Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance of the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct or any other just cause.

The State bears the burden of establishing that just cause supports the discipline imposed. *Harrison & State (Department of Human Services)*, 05-MA- 04 at 9. The presence or absence of just cause must rest on the reasons stated in the disciplinary letter. See *Eaves & State (Department of Corrections)*, 03- MA-04 at 14.

In evaluating a disciplinary action under section 8A.415(2)(b), the

Board looks to the totality of the circumstances.

[W]e believe that a [section 8A.415(2)(b)] just cause determination requires an analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical, inflexible application of fixed "elements" which may or may not have any real applicability to the case under consideration.

Hunsaker & State (Department of Employment Services), 90-MA-13 at 40.

When analyzing all of the circumstances of alleged misconduct, the Board has instructed:

While there is no fixed test to be applied, examples of some of the types of factors which may be relevant to a just cause determination, depending on the circumstances, include, but are not limited to: whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether sufficient evidence or proof of the employee's guilt of the offense is established; whether progressive discipline was followed, or not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty. (Footnote omitted.)

Hoffmann & State (Department of Transportation), 93-MA-21 at 22.

The DHS rules Wise was found to have violated are very general, to the extent they can be fairly summarized as (1) cooperate with your supervisors and comply with their reasonable orders or instructions and (2) do your work properly and efficiently and meet your supervisor's performance

expectations. It is undisputed that Wise had knowledge of those rules. And while reasonable minds might disagree concerning the merit of the conclusions Anders reached as a result of the investigation into the October 2014 discovery of batteries in House 248, the record demonstrates that a fair and reasonably sufficient investigation of the matter was conducted by GRC management.

Similarly, the State has established that the reasons for the discipline imposed were adequately communicated to Wise—i.e., you were directed to see that all batteries were removed from House 248; batteries were subsequently discovered; you didn't personally ensure the batteries were gone, confirm a subordinate's claim they were gone or establish a system to ensure batteries didn't reappear; you didn't require staff to complete ongoing sweeps or provide enhanced supervision, and you didn't visit the home enough or establish regular rounds.

But even assuming that Wise's work performance after Anders' issuance of the August 20 directive to remove all batteries from House 248 was deficient in some respects—a matter upon which the parties disagree—Wise's termination under the circumstances here cannot be viewed as supported by just cause because it flies in the face of the State's claimed adherence to principles of progressive discipline.

The concept of progressive discipline is embodied in the disciplinary action rules of the Department of Administrative Services. PERB has long recognized that the purpose of employee discipline is to correct an

employee's behavior, rather than to punish (see, e.g., *Wullner & State (Department of Corrections)*, 87-MA-16 at 4; *Bell & State (Department of Corrections)*, 88-MA-11 at 7). This goal of correcting perceived employee deficiencies is reinforced by section 11.10 of the State's Managers and Supervisors Manual, which provides in relevant part:

Progressive Discipline: Progressive discipline is the action taken by management to correct or change an employee's behavior. The severity of the discipline increases with the repetition or seriousness of the inappropriate behavior. The specific type of discipline imposed . . . should generally be the least form that will result in the required correction or change. . . .

In order for the desired correction or change to occur, it seems almost axiomatic that the employee must be given a real opportunity to alter the unsatisfactory performance or behavior. As one commentator has noted:

Progressive discipline is a system of addressing employee behavior *over time*, through escalating penalties. The purpose of progressive discipline is to correct the unacceptable behavior of an employee. Employers impose some penalty less than discharge to convey the seriousness of the behavior and to *afford employees an opportunity to improve*.

Norman Brand, *Discipline and Discharge in Arbitration* at 57 (BNA Books 1998) (emphasis added). The significance of the opportunity to improve aspect of progressive/corrective discipline was pointedly recognized by Arbitrator Irving Sabghir:

Progressive and corrective discipline is not simply an escalator to crucify an employee. Through it an employer must demonstrate an honest and serious effort to salvage rather than savage an employee. To hold otherwise distorts, demeans and defeats the

goals underlying the concept of progressive and corrective discipline.

Victory Markets, Inc., 84 LA 354, 357 (1985).

PERB has recognized that some offenses may be serious enough to justify skipping some of the progressive disciplinary steps ordinarily imposed, or to render principles of progressive discipline entirely inapplicable. *Hoffman & State (Department of Transportation)*, 93-MA-21 at 26. Had Wise committed such an offense (such as stealing, striking a supervisor or engaging in other workplace violence, or persistently and willfully refusing to obey a legitimate order or directive) principles of progressive and corrective discipline might well be deemed inapplicable. But such is not the case here, where the asserted basis for the discipline was not some willful act of misconduct, but was instead a perceived performance deficiency which could potentially be corrected by the employee, if given a chance.

In arguing that just cause existed for Wise's termination, the State points out that he had been the recipient of a five-day "paper suspension" which had advised him that additional violations or infractions would result in additional discipline up to and including termination, and that five-day suspensions are viewed by DHS as the penultimate discipline.

The October 3, 2014 discipline had been based in large part on perceived violations of DHS rules 1 and 2 arising out of Wise's perceived performance failures in monitoring and directing others—his claimed lack of knowledge of his responsibility to monitor compliance with certain regulations, his failure to provide direction to subordinate staff and his failure

to complete regular rounds of the houses in his area of responsibility.⁷ The State apparently views the matter as simply that since an additional violation of DHS work rules 1 and 2 had occurred, the ultimate employee discipline was appropriate.

But this position ignores the fact that the grounds for Wise's October 3 suspension involved essentially the same perceived failures, although arising in connection with a separate set of facts, as those which formed the basis for Wise's termination—failure to monitor the removal of batteries from House 248 and to confirm that the removal directive had been followed, failure to specifically establish a system to ensure batteries were not reintroduced (*i.e.*, to provide direction) and failure to regularly conduct rounds to ensure that enhanced supervision of the environment and compliance with the directive was occurring.

The issuance of detailed work directives to Wise on October 3 was presumably designed to impress upon him Anders' expectations and to specify the actions he needed to take in order to improve his performance and meet those expectations. The issuance of those directives, which included regular not-less-than-monthly meetings with Anders, was entirely consistent with the progressive discipline principle that the goal of discipline for performance deficiencies is to correct the substandard performance.

⁷ Although the question is not directly presented by this case, one might reasonably question whether a five-day suspension of a long-term employee with well-above-average performance evaluations and no prior discipline was "the least form [of discipline] that will result in the required correction or change" as contemplated by the progressive discipline principles espoused in the Managers and Supervisors Manual.

But Wise was not afforded any meaningful opportunity to correct what Anders viewed as his performance deficiencies. Three working days following Anders' issuance of the evaluation, work directives and discipline, while Wise was still serving his "paper suspension," he was again suspended and directed to leave the GRC campus. He never was allowed to resume his duties or to make an effort to improve his performance by complying with the work directives he had been given, much less to meet with Anders to review his compliance with them. The termination of an employee for perceived substandard performance, on the heels of a suspension for like conduct and with only a three-working-day opportunity to correct the poor performance, is not consistent with the principles of progressive and corrective discipline.

Had Wise's termination been based upon a rule violation or other offense which was distinct in nature and type from the performance deficiency which had spawned his disciplinary suspension, additional discipline may have been warranted, depending upon the circumstances. Or if Wise had been afforded a meaningful opportunity to improve and had not done so, a subsequent recurrence of the same performance deficiency may well have warranted additional discipline. But neither scenario is the case here.

The parties disagree on whether anything Wise did constituted a violation of the cited DHS work rules—an issue which really need not be discussed in detail. One can surely understand how a busy administrator who has developed a relationship of trust and confidence with a long-term subordinate would accept the subordinate's repeated representations that a

task had been accomplished, as Wise accepted Wallace's report that batteries were out of the house and that sweeps to see that it remained battery-free were occurring every shift. Just as Anders, too, had believed Wallace's indication that the batteries were out of the house—to the extent that Anders assured his supervisor that it was so.

But one might also conclude that Wise's management style of empowering people to do their jobs, trusting those he thought worthy, and supporting while not micro-managing them, was not adequate under the circumstances here. Because he believed, trusted and had faith in Wallace, Wise didn't question him about precisely how the August 20 search of House 248 had been conducted, or follow up on Wallace's statement that the house's staff would be frequently sweeping the environment to ensure that batteries did not reappear. Had he done so he may well have heard the less-unequivocal descriptions of the search and the conflicting descriptions of the continuing efforts to exclude batteries which Wallace and Stafford provided to the DHS investigators, thus prompting him to take appropriate corrective action.

But even assuming the validity of Anders' conclusion that Wise had failed in his administrative responsibilities concerning the battery issues which arose in House 248 and that DHS work rules had been violated, just cause for Wise's termination, or for any other disciplinary sanction, has not been established. The imposition of additional discipline for a recurrence or continuation of the same type of performance deficiency which had formed grounds for Wise's earlier disciplinary suspension, without affording him a

fair opportunity to correct the deficiency, is inconsistent with fundamental tenets of progressive discipline. Having reached this conclusion, it is unnecessary to examine and discuss other issues raised by the parties or other factors which PERB has at times considered relevant in making just-cause determinations in factually distinct cases.

I consequently propose the following:

ORDER

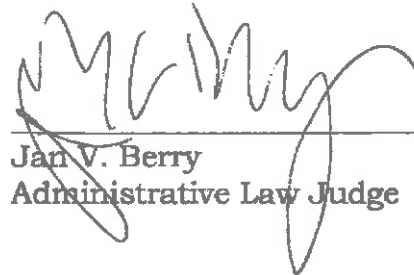
The Department of Human Services shall reinstate Douglas Wise to his former position as Treatment Program Administrator of Glenwood Resource Center's Residential Area 3 (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore his benefit accounts to reflect accumulations he would have received but for his discharge; make appropriate adjustments to his personnel records and take all other actions necessary to restore him to the position he would have been in had his employment not been terminated on October 31, 2014.

This proposed decision and order will become PERB's final agency action on the merits of Wise's appeal pursuant to PERB rule 621-9.1 unless, within 20 days of the date below, a party files a petition for review with the Public Employment Relations Board or the Board determines to review the proposed decision on its own motion.

The ALJ retains jurisdiction of this matter in order to address any remedy-related issues which might hereafter arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this

case, a hearing to receive evidence and arguments on the precise terms of the remedy, should the parties fail to reach agreement, will be scheduled and held within 45 days of the date this proposed decision becomes PERB's final action on the merits of Wise's appeal.

DATED at Des Moines, Iowa, this 14th day of October, 2016.



Jan V. Berry
Administrative Law Judge